Supreme Court, U. S.
FILED
NOV 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-916

LUIS ANTONIO RIVERA,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RUSSELL B. JOHNSON,
King Christian Hotel,
Post Office Box 3649,
Christiansted, St. Croix,
Virgin Islands. 00820
Attorney for Petitioner.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
SUMMARY STATEMENT	2
REASONS FOR GRANTING WRIT	7
CONCLUSION	11
APPENDIX A—Order of the Court, "Government of the Virgin Islands v. Luis Antonio Rivera and Others" D. C. V. I. Cr. No. 1979-49	A1
APPENDIX B—Judgment Order of the Court, "Government of the Virgin Islands v. Luis A. Rivera" CCA 3, No. 79-2043	B1
APPENDIX C—Rivera's Pretrial Motion To Sever	C1
APPENDIX D—Extracts From Trial Transcript	D1

TABLE OF CASES CITED.

U. S. v. Beasley, 479 F. 2d 1124 (1973) C. C. A. 5th	9
U. S. v. Bruton, 375 F. 2d 355 (1967), 391 U. S. 123 (1968)	3

STATUTES AND RULES.

28 U. S. C. 1254(1)	2

MISCELLANEOUS.

American Criminal Law Review Mistrials and Double Jeopardy, by Kenneth M. Rosenzweig, American Bar Association Section on Criminal Justice, Fall 1977, Vol. 15, No. 2	10

IN THE

Supreme Court of the United States

October Term, 1979.

No. .

LUIS ANTONIO RIVERA,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit dated October 17, 1979, affirming the Order of the District Court of the Virgin Islands dated August 1, 1979, denying defendants' motion to dismiss on the grounds of double jeopardy.

OPINIONS BELOW.

The opinion of the District Court of the Virgin Islands was entered August 1, 1979 (Pet. App. A).

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered October 17, 1979 (Pet. App. B).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

> May a defendant be reprosecuted after a mistrial granted on the motion of the defendant caused by prosecutorial gross negligence?

This question should be answered in the negative, contrary to the opinion of the trial court and the first appellate court. The prosecution assured the trial judge before the jury was impaneled that any statement of a co-defendant would be "sanitized" so as not to refer to other defendants. This assurance was violated on two occasions during trial. Thereafter, the trial was aborted as to three defendants and the fourth defendant remained on trial.

SUMMARY STATEMENT.

Five persons were charged by information, filed by the U. S. Attorney, with murder in the first degree, kidnapping, conspiracy, and the use of a non-registered firearm in the commission of a crime of violence.

To aid in understanding the trial record, the following names and identities are set forth:

Defendant	*Nickname*	*Attorney*
Elmo Barnes	Man Rat	Sheen
Floyd Josiah	Blackmouth	Ocean
Juan Rios	Geto	Christian
Luciano Serrano	AliBow	Mingus
Luis Antonio Rivera	Tote	Johnson

Before trial defendant Serrano was severed and the trial proceeded as against the other four defendants jointly. At a pre-trial conference, the prosecution advised the court that three government witnesses would be called to testify as to incriminating statements made to a witness by a defendant. Defendant Rivera moved to sever (Pet. App. C) based upon the law set forth in *U. S. v. Bruton,* 375 F. 2d 355 (1967), 391 U. S. 123 (1968). The motion for severance was denied by the trial judge based on the assurance of the prosecution that the incriminating statements would be testified about in such a fashion as to not name, or otherwise identify, the other defendants.

After the jury was impaneled and sworn, the opening statements made, the prosecution proceeded to call approximately eleven witnesses. These witnesses testified sufficiently for the jury to find that a homicide had been committed; but up to that point in the trial there had been no proof that any of the four defendants had committed it.

The prosecution then called one Clan Jacobs, who was identified in his testimony as being a prison guard at the penitentiary on St. Croix and who also acted as a paid underground informant. The prosecution further laid a foundation for his further testimony by having the witness testify that he had a conversation with the defendant Barnes. His critical testimony is as follows:

> MR. JOHNSON: Judge, if this witness is going to testify that Barnes stated certain things implicating my client——
>
> MR. SCHWARTZ: Your client's name will never be mentioned.
>
> MR. JOHNSON: Then, of course, I object to it, and even though my client's name is not mentioned, it obviously refers to the people charged who are sitting here in the Courtroom.

MR. OCEAN: Your Honor, he identified four persons as the only four persons he will be referring to in his testimony, he has got to be referring to all four, not just one.

THE COURT: I'm sorry, I will overrule the objection.

(Whereupon the following occurred within the hearing of the jury)

Q. (Mr. Meyers) Mr. Jacobs, you stated that Mr. Barnes fled after he observed Detective Farrelly and Detective Rodriguez.

Did there come a time that he came back to you?

A. Yes, sir.

Q. How many minutes, approximately, had gone by from the time he ran to the time he came back?

A. Approximately, maybe two minutes.

Q. And after he returned, did you have a conversation with him?

A. Yes, sir.

Q. What was the nature of that conversation?

A. It was, I asked him why did he run when he saw both Detectives Carlos Rodriguez and Farrelly passing by, and he stated because they are looking for him pertaining to the question of the Luis Golden killing, so I asked him if he was involved in the killing and he said, I iced Golden because he messed up some money and a CB radio and some marijuana that belongs to him and the three other defendants.

Q. That he iced him?

A. Yes, sir.

MR. JOHNSON: Objection to that and ask it be stricken.

THE COURT: Objection overruled.

Q. (By Mr. Meyers) Mr. Jacobs, in your testimony, if I ask you a specific question with respect to a specific defendant, I don't want you to call any other name.

Do you understand that?

A. Yes.

MR. JOHNSON: In that connection, since he already has, I think I am entitled to a direction to the jury.

THE COURT: Yes, you are. (Tr. 196-198)

By referring to the "other defendants" it became apparent to the jury that all four of the defendants were owners of the marijuana testified about and this alone may have been sufficient to support a jury verdict of guilty had a conviction resulted.

Defendant Rivera at this juncture moved for a mistrial and decision on that motion was reserved.

The trial continued and the witness further testified that he was present when all defendants, except Rivera, were having a conversation among themselves:

A. (By the witness) It was both Man Rat was up there, Elmo Barnes, and Floyd Josiah was up there and myself was up there.

Q. (By Mr. Meyers) Anyone else?

A. Geto also came in the area.

Q. Do you know Geto's right name?

A. Rios.

He stated towards Man Rat that he shouldn't kill Golden.

Q. Who said what?

A. Geto stated towards Man Rat because the detectives picked him up pertaining to questioning.

MR. SHEEN: Your Honor, I object. There are serious problems here. I cannot cross examine Geto.

THE COURT: Come to sidebar.

(Whereupon the following occurred at sidebar out of the hearing of the jury)

MR. SHEEN: Your Honor, we anticipated these kinds of problems before this trial commenced, all defense counsel discussed it with Your Honor before the trial commenced. We got assurances from the Government that they had established a procedure whereby the answers to the questions would be given without implicating other defendants, recognizing the grave constitutional problems because it is a joint trial. Now we have a situation where the witness has stated that Geto, a defendant—what is his proper name?

MR. CHRISTIAN: Juan Rios.

MR. SHEEN: Juan Rios said to my defendant, Elmo Barnes, that you should not have killed Golden. There is no way that I can test whether, in fact, that statement was made, cross examine Rios as to the statement attributed to him because he is a defendant in this case. I think that I have been severely prejudiced by that remark. I don't think it can be cured by an instruction to the jury and I respectfully move that a mistrial be declared.

If the Court does not grant a mistrial, I move for a severance for my defendant. (Tr. 203-204)

So we have the foregoing examples demonstrating that the prosecution did not "sanitize" the admissions of various defendants. This failure of the prosecution to control a witness peculiarly in the power of the prosecution to handle is assigned as gross negligence sufficient to bar reprosecution.

REASONS FOR GRANTING THE PETITION.

The American Bar Association's Standards Relating To Joinder and Severance Part 2.3 seeks to govern cases in which the prosecutor proposes to introduce evidence of an out-of-court statement by one defendant that implicates a co-defendant. The key factor of these Standards is its refusal to rely on cautionary jury instructions. Instead, the prosecutor has three choices: require the defendants to be tried jointly and suppress the statement; try the defendants jointly but "sanitize" the statement; or accede to the moving defendants request for severance. Here, the trial judge took the second alternative and required the prosecutor to "sanitize" the various admissions testified about that would implicate a defendant other than the declarant. The following extracts from the record show that all of the lawyers and the trial judge identified what happened in the courtroom as a violation of the assurance made by the prosecutor before trial (Pet. App. D) when the prosecution yielded the witness:

THE COURT: We will have a little recess at this time, let's say about a 20 minute recess.

(Whereupon the hearing was in recess at which time the following occurred within the Chambers of the Court and out of the hearing of the jury)

THE COURT: Well, gentlemen, during this recess I had the reporter read to me several pages from the transcript and I have considerable thought in this short period of time to the motions made and to the possibility of reversible error.

There has been a Bruton problem here, not every incident was a Bruton problem, but there was a Bruton problem when Jacobs replied regarding the pound and a half of marijuana and the CB radio, and

other words that he used, to the other three defendants, he wasn't quoting Man Rat because Man Rat couldn't have used the word defendants, he was telling the jury in no uncertain terms that the other three guys, he could just as well have named them when he said that, and I think, then, that has Bruton status, a limiting or cautionary instruction will not undo the damage.

. . .

THE COURT: See how strong that is?

Well, gentlemen, what can be done about it?

I do know that Mr. Sheen asked for a mistrial, or, in the alternative a severance. The others joined in mistrial motions, I don't know if you joined in a severance motion but I know you joined in mistrial motions.

I want to be sure, though.

I will ask Mr. Johnson, what was your motion? Was it for mistrial and/or severance?

MR. JOHNSON: I know I made the mistrial motion, Judge.

THE COURT: Mr. Ocean?

MR. OCEAN: I made a motion for mistrial, Your Honor.

THE COURT: Mr. Christian?

MR. CHRISTIAN: Joined in both of them.

THE COURT: Severance and mistrial?

MR. CHRISTIAN: Yes, sir.

THE COURT: In thinking about the error made, I do not feel that it is an error towards Man Rat or Elmo Barnes. The only thing that worried me about Elmo Barnes was Geto's statement later, and you make a motion for mistrial and severance because of that.

With these motions before me, I am trying to save what we have in the way of a trial without prejudicing anyone, and I do not think I am prejudicing Elmo Barnes if we continue the trial against him alone and I sever the other three.

I could call it a mistrial or a severance, it doesn't really matter. I would rather say a severance, myself.

. . .

THE COURT: I agree, if the severance were made by Mr. Johnson for his client who was involved in the Bruton problem, there would have to be another jury panel, but I don't think there is a Bruton problem with Elmo Barnes. . . . (Tr. 212-215)

It will be seen from the foregoing that the assurances made by the prosecution to the court and to defense counsel were flagrantly violated. If the witness for the prosecution was one over whom the prosecution had no control, the government might properly argue that it was unable to properly coach and prepare the witness for its testimony. The witness, Clan Jacobs, was a government employee in two respects. One, he was a full-time guard at the penitentiary on St. Croix and on the regular payroll; and two, he also received extra money and compensation as an underground informant working for the Department of Public Safety. As such, he was available for training as a witness. For the government not to avail itself of this opportunity is gross negligence.

Petitioner adopts the statement of law as set forth in the headnote of *U. S. v. Beasley*, 479 F. 2d 1124 (1973) C. C. A. 5th:

> A motion by defendant for mistrial is ordinarily assumed to remove any barriers to reprosecution, even if defendant's motion is necessitated by prosecutorial

> or judicial error, but an exception exists where mistrial motion is the product of prosecutorial overreaching, though state is not barred from reprosecuting defendant when a mistrial results from prosecutorial error which does not amount to gross negligence or intentional misconduct.

Petitioner further relies upon a Criminal Law Review article by Kenneth M. Rosenzweig, entitled "Mistrials and Double Jeopardy", published by the American Bar Association Section on Criminal Justice. This article sets forth with clarity the development of that Constitutional protection which provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb". The conclusion of the writer is:

> Ideally, a constitutional limitation on the power of the state to try an individual for an alleged offense would be capable of being implemented with a relative degree of certainty. Unfortunately, the myriad ways in which a trial can unexpectedly end in a mistrial precludes any degree of predictability. This was one of the premises of Mr. Justice Story's seminal decision in Perez, and the Supreme Court, by its adherence to the flexible "manifest necessity" standard first enunciated in that case, has acknowledged as much. It is not the manifest necessity formula itself that is objectionable; rather, the problem lies in the erratic fashion in which it has been applied. A constitutional guarantee that can result in the immunization from prosecution of both the innocent and the guilty is unlikely ever to be applied in a wholly evenhanded fashion.
>
> But it is also true, as Mr. Justice Douglas has noted, that "the place one comes out, when faced with (questions of double jeopardy), depends largely on

> where one starts." At least where a mistrial has been declared sua sponte or at the request of the prosecution, the potential for reprosecution should be restricted to those instances where the mistrial was caused by an entirely neutral event or was the result of misconduct by the defense. Where the mistrial results from deliberate misconduct by either the court or the prosecutor, retrial is prohibited under existing standards. This should be expanded to include cases of negligence or error on the part of the prosecution or the court. This is because the double jeopardy clause was designed as a shield, an affirmative defense that could be interposed by the individual against the awesome powers of the government. To allow the state repeated opportunities to convict an individual accused of crime unfairly shifts the balance from its proper place in the constitutional scheme. (Footnotes omitted.)

CONCLUSION.

This Honorable Court should grant certiorari such that the expanding limits of this Constitutional doctrine may be further defined for the benefit of the Bar and the Bench of this country.

Respectfully submitted,

RUSSELL B. JOHNSON,
King Christian Hotel,
Post Office Box 3649,
Christiansted, St. Croix,
Virgin Islands. 00820
Tele.: (809) 773-1234
Attorney for Petitioner.

DATED: November 14, 1979

APPENDIX A.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CRIMINAL NO. 79/49

GOVERNMENT OF THE VIRGIN ISLANDS,
Plaintiff

v.

FLOYD JOSIAH,
JUAN RIOS,
LUIS ANTONIO RIVERA,
Defendants

Order.

On July 30, 1979 (just one week before the scheduled trial) defendant Josiah, by his attorney, Edward J. Ocean, Esq., filed a motion for dismissal of the prosecution against him on grounds of double jeopardy. The next day de-

fendants Rivera and Rios by their attorneys, Allan Christian, Esq. and Russell Johnson, Esq., joined in the same motion for dismissal on grounds of double jeopardy.

In view of the fact that many government witnesses had been subpoenaed to return to the Virgin Islands, one from Europe and several from the continental United States, and further in view of the fact that the United States Marshals Office made arrangements for at least twelve additional deputy marshals in order to secure the trial and to secure material witnesses pending trial, I found it necessary to set a hearing on the motions forthwith in order to determine whether there will be trial next Monday or not. For that reason a hearing was held this date, August 1, on the motions to dismiss. After hearing argument of counsel I immediately dictated into the record my decision to deny the motions finding that they were frivolous, absolutely without merit in fact or in law and that they were being made by the attorneys for the purpose of delay only. I made the observation that the matters they complained of occurred several weeks ago, and at that time no objections were taken to the severance from the trial which was proceeded against defendant Elmo Barnes alone. I found it strange that they would make this "eleventh hour" motion knowing that the denial of their motion would give them the delay involved in an immediate and direct appeal.

At the conclusion of my decision and findings the government asked whether or not the defendants plan to appeal. The government had to know in order to avoid the expense of having its witnesses come to the Virgin Islands. Attorney Edward Ocean immediately responded that he did intend to appeal forthwith, and the other attorneys joined in that decision.

The premises considered and for the reasons that I

have found the motion to be frivolous, without merit and for the purpose of delay only, I am denying the motions.

DATED: August 1, 1979.

ENTER:

WARREN H. YOUNG
Warren H. Young, Judge

ATTEST:

EDGAR D. Ross, Clerk

By:

Deputy Clerk

cc: Edward J. Ocean, Esq.
Allan Christian, Esq.
Russell B. Johnson, Esq.
Douglas Schwarts, Esq.,
Assistant U. S. Attorney

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2043

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LUIS A. RIVERA

LUIS ANTONIO RIVERA, *Appellant*

(Criminal No. 79-00049-04, District of Virgin Islands)
Division of St. Croix

Submitted Under Third Circuit Rule 12(6)
October 15, 1979

BEFORE: SEITZ, *Chief Judge,* GARTH and SLOVITER, *Circuit Judges.*

Judgment Order.

After considering the contentions raised by the appellant, to-wit, that (1) before a murder trial with four co-defendants in which the prosecutor advised the court and the defense counsel that the oral testimony of a government paid informant was sanitized and during trial that assurance was violated, the government cannot properly

retry one of the codefendants and (2) the trial court erred in denying defendant Rivera's motion to dismiss the information on the grounds of double jeopardy, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT:

SEITZ

Chief Judge

Attest:

THOMAS F. QUINN
Thomas F. Quinn

Clerk

DATED: October 17, 1979

APPENDIX C.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CR. No. 49-1979

GOVERNMENT OF THE VIRGIN ISLANDS
Plaintiff

v.

LUIS ANTONIO RIVERA, et al,
Defendants.

Motion.

COMES Now, the defendant, LUIS ANTONIO RIVERA, by the undersigned as his attorney of record and moves this Court for an order severing the trial of this defendant from the trial of the other four defendants.

This motion is based upon the records and files herein and upon the following authority: Yesterday, June 11, 1979, the Omnibus hearing was concluded between Ishmael Meyers, U. S. Attorney, Douglas R. Schwartz, Assistant U. S. Attorney, and the undersigned on behalf of this defendant. It was discovered that the theory of the Government's case involves admissions by some, or all, of the other four defendants, which, under the following authority, is inadmissible as to this defendant, c.f., Bruton vs. United States, 375 F. 2d 355 (1967), 391 U. S. 123

(1968). A sterilizing instruction to the effect that the jury shall disregard those admissions by other co-defendants cannot be followed by the jury in this case.

DATED: June 12, 1979

RUSSELL B. JOHNSON
Russell B. Johnson
Attorney for Defendant
LUIS ANTONIO RIVERA

Post Office Box 3649
Christiansted, St. Croix
Virgin Islands 00820
Tele: 773-1234

Certificate of Service.

I HEREBY CERTIFY that an accurate copy of the foregoing was by me hand delivered to the offices of the U. S. Attorney at Hamilton House, Christiansted, St. Croix, and placed in the pidgeonholes provided for such purposes at the Office of the Clerk of the District Court to the attention of attorneys: Albert A. Sheen, Esquire; Edward J. Ocean, Esquire; Allan A. Christian, Esquire; and O. S. Lad Mingus, Esquire, for co-defendants, this 12 day of June, 1979.

RUSSELL B. JOHNSON
Russell B. Johnson

APPENDIX D.

Extracts From Trial Transcript.

[15]

Chambers

I don't believe with the named informant here that we have to get into the two pronged test of Aguilar-Spinelli.

I don't think there are any other motions.

MR. JOHNSON: Yes, sir, I have one.

I filed a motion to sever based primarily on the rule in Bruton versus United States.

THE COURT: You mean difficulty with the confession?

MR. JOHNSON: Yes, sir.

MR. MEYERS: Your Honor, may I respond?

THE COURT: Yes.

MR. MEYERS: With respect to the Bruton problem, we have gone over this issue with our witnesses and we have admonished them not to call any names unless it is a Defendant who spoke to them, and we have a system whereby they will be referring to the other parties as "A", "B", "C" and "D", and we think that should overcome any Bruton problem.

THE COURT: Is this a statement?

MR. MEYERS: Evidence. For example, Clan Jacobs is going to say that Blackmouth, which is

[16]

Floyd Josiah, told him that Man Rat and Tote and Geto were the others who did the killing.

We have told our witness to say that Blackmouth told him "A", "B" and "C" did the killing without calling the names of the other Defendants.

MR. SCHWARTZ: In referring to the Defendants other than the one that spoke to them.

MR. MEYERS: According to Bruton, it is permissible to say Blackmouth told him three persons killed him rather than saying "A", "B" and "C" did the killing.

I don't don't see any violation of the Bruton rule.

MR. SCHWARTZ: There are no confessions in this case to police.

THE COURT: Well, not to the police, but there are confessions to Clan Jacobs.

MR. MEYER: And to two other witnesses.

THE COURT: We have to be very careful about this.

MR. SCHWARTZ: We have worked with all three, a number of witnesses, Your Honor, and have let

[17]

them know that they cannot make any errors and come out with names.

THE COURT: I won't have to call them to the sidebar to warn them?

MR. MEYERS: It might be worthwhile to do it.

MR. SCHWARTZ: We have instructed them.

THE COURT: Is there any problem with that?

MR. JOHNSON: Naturally, yes.

THE COURT: Can you give me some specific reason why it can't be redacted?

MR. JOHNSON: Judge, the risk of a coached witness forgetting his coaching is great.

THE COURT: The risk of a coached witness' what?

MR. JOHNSON: To stay coached is great, and these witnesses may forget their training and speak names rather than letters.

THE COURT: Then there would be a mistrial.

MR. JOHNSON: Yes, there would be.

[18]

MR. SCHWARTZ: None of the witnesses want to go through this again, Your Honor.

THE COURT: I don't either.

MR. JOHNSON: Judge, there are some due process questions in this case, also.

MR. SHEEN: Excuse me.

Your Honor, before we move from the Bruton problem, I wish to indicate for the record that I object to the manner in which the testimony is going to be handled. I don't think the problem is cured by Clan Jacobs, for example, saying "Floyd Josiah told me that "A", "B" and "C" told me such and such."

I think Clan Jacobs can only say what Floyd Josiah told him Floyd Josiah did, and that is it, otherwise I think there is a Bruton problem.

* * *